No. 88-340

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

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ALEXANDER PERUMAL, *et al.*,

Plaintiffs and Petitioners,

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT, *et al.*,

Defendants and Respondents.

—o—

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

—o—

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QUESTIONS PRESENTED

1. Whether a public high school must permit an off-campus, private religious club composed of students to advertise on campus during the instructional day meetings of a religious nature to be held during the instructional day, despite the school district's policy of excluding operation and advertising by all clubs and organizations which are not school-sponsored and related to the school district's curriculum?

2. Whether the establishment clause of the First Amendment is violated if a school district allows high school students on a high school campus during the compulsory instructional day to proselytize and advertise prayer and Bible study meetings by distributing religious literature?

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ALEXANDER PERUMAL, *et al.*,
Plaintiffs and Petitioners,

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT, *et al.*,
Defendants and Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Respondents respectfully request this Court deny Petitioners' petition for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth District, Division 3.

OPINIONS BELOW

The judgment of the Court of Apepal was rendered on January 29, 1988, and is reported at 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (1988). The opinion affirms the judgment of the Superior Court of Orange County, California, Case No. 45-78-95, filed July 1, 1985, an unreported judgment.

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JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. § 1257(3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Relevant portions of the State of California Education Code §§ 44807, 48907, 48930, 48932, 48200, and Title 5 of the California Administrative Code, § 5552, are set forth in Appendix A attached hereto.

Saddleback Valley Unified School District Board Policy No. 5133.1 and Administrative Regulation 5133.1, only

parts of which are set forth in the Appendix to the Petition, are included in their entirety as Appendix B attached hereto.

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STATEMENT OF THE CASE

The Saddleback Valley Unified School District is a political subdivision of the State of California, organized for the purpose of operating a public school system. The District operates several high schools, including Mission Viejo High School and El Toro High School. During the 1981-82 school year, the District allowed its high schools to sponsor student religious clubs known as "New Life," which were dedicated to Christian Bible study and prayer. In March 1981, as a result of parent complaints and a County Counsel opinion, the District withdrew its official recognition of "New Life" but allowed students to continue to meet in classrooms during the school day and to advertise their meetings as unofficial organizations. (Pet. App. A at 2a, n.1)

In May 1982, the District adopted a new policy with respect to student clubs. The new policy limited the use of school facilities during the school day to those clubs which were school-sponsored. (SCF 165-166, 189)[1] The policy further provided that "No off-campus or private

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[1] SCF, meaning Superior Court File, refers to the record on appeal in this action in the California appellate system. Pursuant to local rule, and by stipulation of the parties, the record on appeal in California consisted of the original Orange County Superior Court file (Case No. 457895) rather than a Clerk's transcript. All subsequent SCF references are to this source.

clubs are permitted to function in the School. They are also restricted from advertising in any form." Saddleback Valley Unified School District Board Policy 5133.1. (Reply App. B at 7) Student-sponsored clubs share certain criteria. The clubs must be approved by the associated student governing body and the principal of the school, membership is limited to students attending the school, and membership must be open to all students who meet the qualifications and standards of membership set forth in the club charter. Each organization is required to be sponsored by a faculty member who will attend all meetings. School-sponsored clubs are permitted to use the official name of the school, use school buildings and other facilities, publicize activities on daily bulletin boards and in school publications, wear identifying symbols and sell on school premises tickets to special activities sponsored by the organization. (Reply App. B at 6)

Administrative Regulation 5133.1 requires that school clubs have a curriculum-related purpose and conduct activities in compliance with Board policies. The regulation makes the principal responsible for insuring that no off-campus, private or non-sponsored clubs or organizations function on the campus *during the school day,* including break times, lunch period or other non-classroom time.[2] (Reply App. B at 8) (Emphasis added.) Pursuant to Board policies, all clubs and student organizations are part of the District's educational program. (SCF 182, 184) The regulation further provides that off-campus, private or

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[2] The lunch period is considered an inseparable part of the school day. *Johnson v. Huntington Beach Union High School District,* 68 Cal. App. 3d 1, 13 n.11, 14 n.12, 137 Cal. Rptr. 43, *cert. denied,* 434 U.S. 887 (1977).

non-sponsored clubs or organizations may apply through appropriate channels to use school facilities outside of the school day.[3] (Reply App. B at 8)

In the fall of 1982, students associated with the New Life Club inquired of the principals of El Toro and Mission Viejo High Schools whether they could formally meet for the purposes of discussing their particular religious viewpoints and for prayer. The students were advised they could not formally meet as a club or off-campus organization, but they were free to eat lunch together and discuss whatever they desired. (SCF 143, 150; Pet. App. A at 2a, n.1) The right to such individual and personal expression is recognized by Board Policies 5145.3 and 6144.1 (Pet. App. F at 51a-53a), which is incorporated by reference into the District's Administrative Regulation 5133.1 on student organizations. (Reply App. B at 9) District administrators, from time to time as part of the normal monitoring of campus activities, observed groups of students reading and discussing the Bible during their lunch break. However, there was no effort by these students to formalize their organization by appointing or electing officers or by advertising their meetings. (SCF 143, 150)

In the beginning of the 1984-85 school year, the student petitioners in this case attempted to re-establish formal New Life Clubs at their respective campuses pur-

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[3] Public schools outside of the instructional day are civic centers available to students for non-school but related purposes. California Education Code § 40041. Students may use these facilities subject to various regulations relating to availability and non-interference with the general school process. Petitioners in this case have been repeatedly informed of their rights pursuant to these provisions and their ability to apply for such usage. (SCF 177)

suant to the Federal Equal Access Act of 1984. (20 U.S.C. §§ 4071, *et seq.*) Acting as Presidents of the New Life Clubs at their respective high schools, Petitioners Read and Perumal, with the support of a citizens' Christian evangelical group, appeared at various School Board meetings requesting they be allowed to operate on campus like other student clubs. (Pet. App. A at 2a, n.1) These requests included demands for the right to use a classroom for meetings and to advertise club meetings through the media of the school bulletin, advertising flyers passed out to other students and posters placed in the school hallways. (SCF 181) The request was based on an assertion that the District allowed other non-curriculum related clubs to meet. In response, the District surveyed existing clubs and concluded all clubs were school-sponsored and, in effect, curriculum-related.[4] The District specifically informed Petitioners that in fact the District did not have a limited open forum. (SCF 182)

Petitioners then requested the Board of Trustees to consider modification of its existing policy by establishing a limited open forum in order that Petitioners might formally meet and advertise their Bible study and prayer meetings. A public meeting was held on the matter and after extensive public debate, including statements from both Petitioners and their parents, individual Board members expressed their opinions that the existing policy and practice should not be changed or modified. (SCF 185)

Notwithstanding the Board's decision, Petitioners attempted to circumvent the policy and reinstate non-school

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[4] This finding by the District was not challenged in these proceedings.

sponsored high school clubs by advertising on campus New Life Club or group activities, including Bible study and prayer meetings to be held during the school day. In a letter to the principal on February 7, 1985, Petitioner Perumal, as President of the El Toro New Life Club, requested the right to distribute a flyer which advertised, "New Life at ETHS." (SCF 144, 147) The flyer indicated New Life meetings occurred on-campus every Tuesday and Thursday during the lunch period of the school day, and stated the Club's purposes were Bible study, "meeting with other Christians at school," and "praying for the needs of others while they pray for your needs." Petitioner Perumal's request was denied in light of the District's policy concerning private or off-campus organizations. (SCF 144)

In March 1985, Petitioner Read, as President of "New Life, Mission Viejo High School," made a similar request for permission to distribute a flyer advertising Bible study, "learning about Jesus Christ," "helping others through prayer," and "having Christian friends." This request was also denied by the principal after a meeting with Petitioner wherein the District policy was explained. (SCF 151) Both the Perumal and Read decisions were based upon the conclusion that neither organization had any relationship to the school's curriculum.

Petitioner Read later attempted to submit an advertisement to the school yearbook. The advertisement would have publicized New Life meetings to be held on campus during the school day, and, quoting from the New Testament, proclaimed the religious nature and purpose of the Club. (SCF 157) The advertisement was rejected on the basis of the District's policy. (SCF 152)

Finally, on March 26, 1985, both Petitioners attended a meeting with the District Superintendent and the principal at Mission Viejo High School. During this meeting, Petitioners renewed their request to distribute flyers advertising their meetings, and requested the entire issue be placed on the School Board meeting agenda. Petitioners acknowledged that the purpose of the request was to better proselytize for membership. (SCF 187) Petitioners were informed they previously had been given the opportunity to fully address the School Board with their request to have the campus opened up to non-school sponsored, non-curriculum related clubs, and entitle them to meet and advertise their meetings. Petitioners were reminded that their request, after extensive public debate, had been rejected, and it was felt there was no point in revisiting the matter. (SCF 176-177)

Thereafter, Perumal and Read commenced an action in the California Superior Court seeking a writ of mandate and challenging the District's regulations and actions on the basis of California Education Code Section 48907 and the First Amendment's guarantee of the right to free speech. Petitioners requested the Court mandate they be permitted to publish their advertisement in the Mission Viejo High School yearbook, and they and their fellow students be allowed to distribute flyers advertising their meetings in accordance with California Education Code Section 48907.[5] The District defended first on the basis

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[5] While the suit also requested damages according to proof, no evidence was submitted to the court of any damages. Under a fundamental doctrine of appellate review, all legitimate and

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that its policy was a valid regulation governing operation of student organizations and clubs and that the policy precluded non-school sponsored clubs and organizations from meeting or advertising during the instructional day. Secondly, the District maintained that to allow the distribution of religious flyers and materials on a public school campus during the instructional day would violate the establishment clause of the First Amendment of the United States Constitution and various provisions of the California state constitution.

The matter was submitted to the Superior Court on the basis of the petition, the return, the demurrer thereto, and evidence submitted by Respondents by way of declaration.[6] The petition was denied (SCF 444), and Petitioners did not request a statement of decision.[7]

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reasonable inferences must be indulged in to uphold the verdict of the trial court. When a verdict is attacked, the power of the reviewing court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding below; *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 142 (1913); *Estate of Teel*, 25 Cal. 2d 520, 527 (1944); unless the record affirmatively demonstrates error, the reviewing court will adopt the holding below. *Kompf v. Morrison*, 73 Cal. App 2d 284, 286-287 (1946). In this case, Petitioners failed to present *any* evidence of damages at the trial court level and thus, on appeal, cannot raise the issue of damages.

[6] Petitioners had originally requested an evidentiary hearing. (SCF 388) However, at the time scheduled for the matter, Petitioners agreed to go forward on the basis of the written record before the trial court.

[7] Under California Code of Civil Procedure Section 632, any party appearing at trial may request a statement of decision

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The California Court of Appeal affirmed by a divided vote of 2 to 1. In so doing, the court rejected Petitioners' main argument that the District's action violated California Education Code Section 48907, which provides a broad spectrum of free speech rights to students. The court concluded the statute allows school districts to promulgate their own "lawful regulations" and provides student rights may be restricted if the expression violates those lawful regulations. (Pet. App. A at 4a-5a) The court recognized that the policy prohibiting off-campus or non-school sponsored clubs from functioning or advertising on campus was a valid rule under Education Code Section 48907. The court also recognized the District's right to elect to maintain a closed forum as opposed to a limited open forum. (Pet. App. A at 7a and 9a) Moreover, the court rejected Petitioners' argument that New Life was not in fact an off-campus or private club. Instead, the court found the structure surrounding the group's meetings, including its leadership hierarchy, advertising, instruction, and meeting schedule, were all indicative of an off-campus or private club, thereby bringing the organization within the ambit of the rule. (Pet. App. A at 6a-7a) The court further concluded that a religious club operating in the closed forum adopted by the District would vio-

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explaining the legal and factual basis for the court's decision on each principal controverted issue. The request must be made within 10 days after the court announces a tentative decision. Failure to request a statement of decision results in an assumption by the reviewing court that the trial court made findings necessary to sustain the judgment. *Michael U. v. Jamie B.*, 39 Cal. 3d 787, 793, 218 Cal. Rptr. 39 (1985). And as discussed in footnote 5, *supra*, a reviewing court will indulge in every reasonable inference to sustain a judgment below.

late both state and federal constitutional proscriptions against the establishment of religion. (Pet. App. A at 9a-13a)

Petitioners sought discretionary review by the California Supreme Court, which was denied on April 27, 1988. This Petition for Certiorari followed.

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SUMMARY OF ARGUMENT

Contrary to Petitioners' assertion, this case does not involve individual expression or questions of censorship on the basis of subject matter. Rather, the issue is whether a public school district devoted to primary and secondary education has the right to limit the use of its facilities during the compulsory attendance day to student organizations and clubs which are related to the school district's educational program. Respondents' activity in this case is limited to enforcing a policy, which applies only to off-campus or private clubs that attempt to function and advertise in a school, during the time set aside for the curriculum and matters attendant thereto. Excluding off-campus clubs and organizations from operations during the compulsory attendance day, as was done in this case, is entirely consistent with this Court's recent determinations in *Hazelwood School District v. Kuhlmeier,* 498 U.S. —, 98 L.Ed. 2d 592, 108 S.Ct. 562 (1988); *Cornelius v. NAACP Legal Defense and Educational Fund,* 473 U.S. 788 (1985); and *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37 (1983). Furthermore, the School District's decision is a legislatively

recognized option under the Equal Access Act. 20 U.S.C. §§ 4071, *et seq.* In addition, the California Court of Appeal correctly found that under the circumstances of this case, the distribution of religious literature and advertisements on a high school campus would violate the California and United States Constitutions. Under the facts of this case, the state court of appeal's decision was correct and consistent with well-established precedent, and should not be reviewed.

ARGUMENT

I. THE SCHOOL DISTRICT'S DECISION TO LIMIT STUDENT CLUBS AND ORGANIZATIONS WHICH OPERATE AND ADVERTISE DURING THE INSTRUCTIONAL DAY TO THOSE THAT ARE SCHOOL-SPONSORED AND CURRICULUM-RELATED IS CONSISTENT WITH THIS COURT'S FIRST AMENDMENT FORUM ANALYSIS.

In *Perry Education Association v. Perry Local Educators' Association, supra,* 460 U.S. 37, this Court recognized three types of forums: the open forum, those places which from time immemorial have been open for public debate and discussion such as streets and parks; the limited forum, public property the state has opened for use by the public as a place for expressive activity; and the non-public forum, public property which is not by tradition or designation a forum for public communication. With respect to the first two forums, reasonable time, place and manner regulations are permissible but content-based restrictions must be narrowly drawn to effectuate a com-

pelling state interest. 460 U.S. at 45-46. However, this Court has held the state may reserve the non-public forum for "its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's viewpoint." 460 U.S. at 46.

In discussing its forum analysis, this Court in *Cornelius v. NAACP Legal Defense and Educational Fund, supra*, 473 U.S. 788, noted there must be "clear evidence" of an intent by the state to create a public forum. With respect to control of access to a non-public forum, the Court recognized a public agency could exclude a speaker addressing a topic not encompassed within the purpose of the forum. 473 U.S. at 806. (See also *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). Additionally, a speaker who was not a member of the class of speakers for whose special benefit the forum was created could be excluded from the forum. *Cornelius, supra*, 473 U.S. at 806. (See also *Perry Education Association, supra.*)

In *Hazelwood School District v. Kuhlmeier*, 498 U.S. —, 108 S.Ct. 562, *supra*, this Court specifically noted public schools do not possess all of the attributes of streets, parks and other traditional public forums. 108 S.Ct. at 567. Further, the Court decided school facilities may be deemed public fora only if school authorities have, by policy or by practice, opened those facilities for indiscriminate use by the general public or by some segment of the public such as student organizations. 108 S.Ct. at 568. The Court recognized if instead of opening the forum, school facilities have been reserved for other intended purposes, communicative or otherwise, then no public forum has been created. In such case, school offi-

cials may impose reasonable restrictions on the speech of students, teachers and other members of the school community. In *Hazelwood,* the Court concluded the school-sponsored newspaper was not a limited forum for student expression since school officials had clearly retained control of the student newspaper for educational reasons. 108 S.Ct. at 568-569. Additionally, the Court noted that school district inaction, by not silencing students' personal expression, which happened to occur on school premises did not, in and of itself, create a public forum. 108 S.Ct. at 569. The Court recognized certain activities, such as those the public might reasonably perceive to bear the imprimatur of the school, may be fairly characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to students and audiences. 108 S.Ct. at 569-570. The Court concluded that the student expression standard previously recognized in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), did not establish a standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. 108 S.Ct. at 570-571.

Consistent with this Court's opinions in *Perry, Cornelius* and *Hazelwood,* the Saddleback Valley Unified School District has determined *not* to take affirmative action to establish an open forum for student organizations or clubs.[8] Rather, the District has determined that

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[8] This determination is also consistent with the recently enacted Federal Equal Access Act (20 U.S.C. §§ 4071, et seq.),

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during the instructional day, the only clubs and organizations permitted to operate on campus are those which are curriculum-related or related to the educational program of the District. Such is the essence of District Policy 5133.1 and the practice surrounding that policy.[9] This District policy, which excludes *all* off-campus and private clubs and organizations from operating and advertising[10] during the instructional day, is quite clearly viewpoint

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which requires a school district provide equal access in the event a limited open forum is created. The Act presupposes a choice on the part of the school district between a limited open forum and a closed forum. See *Student Coalition for Peace v. Lower Merion School District Board of School Directors*, 776 F. 2d 431, 442 (3rd Cir. 1985). Such a choice is not only inherent within the terms of the Act itself, but is clearly consistent with the legislative history behind the Act. 130 Congressional Record, H-7739 (Daily Ed. July 25, 1984) (Statement of Rep. Synar); *Id.* at H-7736 (Statement of Rep. Bonker); *Id.* (Statement of Rep. Pepper).

[9] The yearbook advertisement is not in fact unique as suggested by Petitioners. Just as the newspaper in *Hazelwood*, the yearbook is a school-sponsored document. While commercial advertisements have been accepted to defray operating expenses (amounting to less than 5% of the budget) (SCF 152), it is clear that off-campus and private club advertising in the yearbook is specifically excluded by District Policy 5133.1. As such, private club advertisements represent a topic not encompassed within the purpose of the forum. This determination is analogous to the ban on political advertisements addressed by this court in *Lehman v. City of Shaker Heights, supra*, 418 U.S. 298 (1974). See *Cornelius v. NAACP Legal Defense and Educational Fund, supra*, 473 U.S. 788, 806.

[10] The Petition also fails to recognize the difference between informal discussions, which the District has never sought to restrict, and solicitations to join in formal meetings. As recognized by this Court, however, "solicitation of membership itself involves a good deal more than the simple expression of individual views." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 131 (1977).

neutral[11] and is reasonably related to the purpose of the forum.

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[11] In this respect, the present case is completely dissimilar to *Tinker, supra,* wherein the rule at issue found by this Court to be unconstitutional was expressly viewpoint-based. In *Tinker,* the Court emphasized the fact that school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance, but only banned a specific symbol exhibiting opposition to the nation's involvement in the Vietnam war. The *Tinker* Court very clearly recognized the regulation in question prohibited expression of one particular opinion. 393 U.S. at 510-511. A similar distinction can be made with respect to another case relied upon in the petition, *San Diego Committee v. Governing Board of Grossmont Union High School District,* 790 F. 2d 1471 (9th Cir. 1986). In *San Diego,* once again there was a clear restriction based upon the speaker's viewpoint since the newspaper in question had accepted advertisements supporting the draft, which the court recognized as political speech, while rejecting an advertisement in opposition thereto.

Likewise, the reliance of the petitioners on the "underground newspaper" cases is not well-taken. (Pet. at 18, n.13) Those cases, which by and large apply the *Tinker* analysis, involve primarily overbroad or vague policies, which effectively prohibited all types of individual student expression. See *Jacobs v. Board of School Commissioners,* 490 F. 2d 601 (7th Cir. 1973), *vacated on jurisdictional grounds,* 420 U.S. 128 (1975) (underground student newspaper involving individual expression); *Baughman v. Freienmuth,* 478 F. 2d 1345, 1347-1348 (4th Cir. 1973) (individual expression attacking school regulation prohibiting a form of pamphleteering); *Karp v. Becken,* 477 F. 2d 171, 174-175 (9th Cir. 1973) (school district had the right to discipline student for disruption caused by carrying a placard); *Fujishima v. Board of Education,* 460 F. 2d 1355, 1356 (7th Cir. 1972) (individual expression by two students by means of an underground newspaper); *Shanley v. Northeast Independent School District,* 462 F. 2d 960, 964 (5th Cir. 1972) (individual expression involving an underground newspaper distributed off-campus); *Eisner v. Stamford Board of Education,* 440 F. 2d 803, 805, 808 (2nd Cir. 1971) (recognition of school authorities' right to preclude or restrict distribution of off-campus student newspapers on school property, but finding policy vague with respect

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The exclusion of off-campus and private clubs and organizations from functioning and advertising on a school campus during the instructional day serves legitimate and important purposes directly related to the educational function of the school. First, since the school has a limited amount of resources and facilities available during the instructional hours for student organizations, the District has determined those resources should be limited to

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to definition of distribution); *Riseman v. School Committee, City of Quincy*, 439 F. 2d 148, 149 (1st Cir. 1971) (school authority rule designed for the purpose of controlling in-school advertising or promotional efforts of organizations held to be vague and improperly used to control distribution of an anti-war leaflet); *Scoville v. Board of Education*, 425 F. 2d 10, 11 (7th Cir.) *cert. denied*, 400 U.S. 826 (1970) (individual expression criticizing school policies and authorities); *Thomas v. Board of Education Granville Central School District*, 607 F. 2d 1043, 1045, 1050 (2nd Cir. 1979) (off-campus distribution of individually-produced newspaper); *Bystrom v. Fridley High School Independent School District No. 14*, 822 F. 2d 747, 749-750 (8th Cir. 1987) (school district may prohibit the distribution on school property of an underground newspaper).

Rather, this case is consistent with other cases holding that a public school is not necessarily a public forum for the purpose of non-school related gatherings and activities. *Student Coalition for Peace v. Lower Merion School District Board of Directors*, 776 F. 2d 431, 435 (3rd Cir. 1985); *Garnett v. Renton School District No. 403*, 675 F. Supp. 1268 (W. D. Wash. 1987); *Cf. Katz v. McAulay*, 438 F. 2d 1058 (2nd Cir. 1971) *cert. denied*, 405 U.S. 933 (1972); *Karp v. Becken, supra; Clark v. Dallas Independent School District*, 671 F. Supp. 1119, 1122 (N. D. Tex. 1987).

Finally, in *Tinker*, the Court also recognized that expression cannot intrude upon the work of the school. *Tinker, supra*, 393 U.S. at 508. In this respect, the meeting and advertisement of off-campus and private clubs in fact does intrude upon the District's ability to effectively sponsor and utilize limited attendance day non-classroom time for classroom-related purposes. See discussion at pp. 17-19, *infra*.

student groups and organizations which directly relate to the school's established curriculum. In this respect, the District has required that faculty members be involved in the operation of school-sponsored clubs. Second, the District wishes to avoid diluting the potential educational enrichment provided by school-sponsored organizations such as could result if curriculum-related organizations were placed in competition with private clubs for student attention and interest.[12] Third, the need to monitor and control student organizations and clubs operating within the school framework or setting has long been a matter of public concern and policy.[13] In this respect, the California legislature has expressly authorized public school boards to charter student organizations and control their activities. California Education Code Sections 48930, *et seq.* Moreover, a majority of states have legislation prohibiting elitist social clubs and organizations from operating on school campuses. These regulations recognize the potentially detrimental impact and effect such organiza-

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[12] See *Katz v. McAulay, supra,* 438 F. 2d at 1061, wherein the court noted: "Where outside organizations or individuals espousing various causes seek to take advantage of the required assemblage of secondary school pupils as a captive audience to solicit funds, either directly or through the agency of some of the pupils, for their particular project or cause, they are in effect in competition for the time, attention and interest of the pupils with those who are seeking to administer the school system. Whether it is done a few minutes before school opens or a few minutes after, its effect is not so limited in time and it is plainly harmful to the operation of the public schools."

[13] The School District has a statutory duty to provide supervision. Calif. Education Code Section 44807; 5 Cal. Admin. Code Section 5552; see, *Ziegler v. Santa Cruz High School District,* 168 Cal. App. 2d 277, 284 (1959). See also *Bethel School District No. 403 v. Fraser,* 478 U.S. —, —, 92 L.Ed. 2d 549, 559, 106 S.Ct. 3159 (1986).

tions can have upon school purposes. See *Robinson v. Sacramento City Unified School District*, 245 Cal. App. 2d 278, 289, 53 Cal.Rptr. 781 (1966) for a review of the states with similar legislation and cases dealing with such restrictions; see also, Annot. Regulations as to Fraternities and Similar Associations Connected with Educational Institutions, 10 A.L.R. 3d 389 (1966).

In sum, Saddleback Valley Unified School District has chosen to devote the six hours of the compulsory attendance school day to educational courses and curriculum-related activities. Students who wish to join organizations or engage in other types of activities outside of the curriculum have the remaining 18 hours of each day available to them. Furthermore, students joining such organizations have access to school facilities under the Civic Center Usage Act.[14] California Education Code § 40041. In this case, the California appellate court found

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[14] While the District does not believe it must justify its regulation on a time, place or manner basis, the District does believe that such justification could be found. Since off-campus and private clubs and organizations are free to use the school facilities in accordance with the limited forum created by the California Civic Center Act (i.e., outside of the instructional day), use restrictions during the compulsory attendance day are reasonable time, place and manner restrictions.

The compulsory attendance day, which is reserved for classroom instruction and student organizations related to the curriculum, is not the appropriate time for off-campus private clubs to function. By delegating those activities to a time after the compulsory attendance day, the District regulation could be considered an appropriate time restriction. Students could meet on campus shortly after the attendance day has concluded and, in that respect, gain whatever benefits they desire. See Reply App. B and discussion, *supra* at pp. 17-18. *Cf. Cornelius, supra; Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

not only a clear intent by the School District to maintain a closed forum but also that Petitioners, as a matter of fact, were attempting to advertise and operate as an off-campus or private club in violation of the policy.

II. THE SCHOOL'S PROHIBITION ON ADVERTISEMENTS BY OFF-CAMPUS AND PRIVATE CLUBS IS NOT OVERBROAD OR VAGUE.

The School District's policy is not overbroad. As this Court recognized in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. —, —, 96 L.Ed. 2d 500, 507, 107 S.Ct. 2568 (1987), a statute is invalid on its face only if the overbreadth is "substantial." Moreover, unlike the Airport Board resolution found invalid in *Jews for Jesus*, the District's policy and rule does not create a First Amendment free zone or area. The only expression prohibited by the policy is a specific category of speech which, as noted above, is inconsistent with the purpose and intent of the forum. The policy only prohibits advertisement of off-campus or non-school sponsored clubs or organizations operating "in the school."[15] As such, it only applies to a narrow class of expression and only during the instructional day. Other types of student expression are not impacted.[16]

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[15] The rule in question is much more narrowly drawn than the regulations upheld by this court in *Bethel v. Fraser, supra*, 478 U.S. at —, 92 L.Ed. 2d at 555.

[16] District Administrative Regulation 5133.1 refers to Board policies 5145.3 and 6144.1, which specifically allow students to wear buttons, badges and other insignia, and allow students the right to free expression. Clearly, the intent behind the regulation

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In the case at hand, the restriction as applied and interpreted by the California court was limited to off-campus or private clubs, which maintain a leadership structure for the purpose of pursuing the club's goals, recruit new members and advertise regular meetings scheduled on an ongoing basis at specific times and locations.[17] Clearly, the rule does not apply to individual or spontaneous discussions. In effect, the regulation prohibits off-campus groups and organizations from exploiting the public school system with its compulsory attendance day. By their own actions, Petitioners' New Life organizations ceased being merely on-campus informal, private discussion groups and became structured organizations, which sought to expand by advertising. Therefore, New Life became clearly recognizable off-campus or private clubs within the purview of the District policy.[18]

(as recognized by the appellate court) was to follow both this Court's mandate in *Tinker* and the statutory mandate of California Education Code § 48907. See *Board of Airport Commissioners v. Jews for Jesus, supra,* 482 U.S. at —, 96 L.Ed. 2d at 508.

[17] This finding was consistent with the declarations of the principals who are responsible for enforcement of the policy. (Reply App. B at 7-8) (SCF 144, 152-153).

[18] To the extent Petitioners allege that the policy is vague and therefore invalid, they ignore this Court's direction in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489 (1982). In *Hoffman Estates,* the court held: "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine complainant's conduct before analyzing other hypothetical applications of the law." 455 U.S. at 495. Moreover, there has been no showing that historical application has in any way precluded groups or individuals from engaging in *any* of the non-covered conduct outlined in the Petition at pages 12-13.

III. POTENTIAL VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE U.S. CONSTITUTION AND OF THE CALIFORNIA CONSTITUTION PROVIDES A COMPELLING STATE INTEREST WITH RESPECT TO THE ADVERTISEMENTS IN QUESTION IN THIS CASE.

There is no question that the advertisements in question in this case are part of a plan to proselyte youth attending a public high school for religious purposes.[19] By advertising, Petitioners and their outside sponsoring organization (Pet. App. A at 2a, n.1) were seeking to take advantage of the state's compulsory school attendance laws. In light of the circumstanes of this case, the School District's policy served a compelling state interest by complying with the District's constitutional obligation not to violate the establishment clause of the United States Constitution or the state constitutional mandate that schools not be used for religious purposes.[20] Cf. *Widmar v. Vin-*

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[19] In their March 26, 1985 request to the District Superintendent, Petitioners wrote: "As representatives of student Bible studies currently taking place on campus, we are asking for a medium to make other students aware of our meetings. Our research indicates that a significant number of students do not know that we exist." (SCF 187)

[20] Article I, Section 4, and Article XVI, Section 5, of the California State Constitution prohibit any state establishment of religion. In *Bennett v. Livermore Unified School District*, 193 Cal. App. 3d 1012, 1016-1017, 238 Cal. Rptr. 819 (1987), the court held the California constitutional provisions in the area of religious involvement in the schools to be more comprehensive and restrictive than those of the federal Constitution. As the court noted therein: "It bans any official involvement, whatever its form, which has the direct, immediate and substantial effect of promoting religious purposes." See also *Johnson v.*

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cent, 454 U.S. 263, 271 (1981), wherein this Court noted that a public agency's interest in complying with its constitutional obligations may be characterized as compelling.

The impact of student religious activity on a public high school campus has been reviewed and discussed by the United States Court of Appeals for the Second, Third, Fifth, Ninth, Tenth, and Eleventh Circuits. In examining religious activity on the high school campus, courts have applied this Court's tripartite test for establishment clause violations as announced in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). The various Circuit Courts of Appeals have recognized that in light of compulsory attendance laws and the impressionable nature of students of high school age, religious activity on a public school campus during the compulsory attendance day is incompatible with the basic and fundamental purpose of public education, and in effect violates the second and oftentimes the third prong of the *Lemon* test.[21] Moreover, the impressionable nature of

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Huntington Beach Union High School District, supra, 68 Cal. App. 3d 1, 15-16, wherein the court noted the California Constitution prohibited school officials from permitting a Bible study class to meet and conduct its activities on the school campus during the school day.

[21] In *Brandon v. Board of Education of Guilderland Central School,* 635 F. 2d 971 (2nd Cir. 1980), *cert. denied,* 454 U.S. 1123, *reh. denied* 455 U.S. 983 (1981), the Second Circuit concluded voluntary student-initiated prayer meetings, which occurred during school hours, created the appearance of official support to impressionable students and thereby advanced religion. 635 F. 2d at 978-979. The Court further noted that the supervision required by state law during school hours also in-

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volved impermissible entanglement of state and religion in violation of *Lemon*. 635 F. 2d at 979. In *Bender v. Williamsport Area School District*, 563 F. Supp. 697 (M. D. Pa. 1983), *reversed*, 741 F. 2d 538 (3rd Cir. 1984), *vacated on jurisdictional grounds*, 475 U.S. 534 (1986), the Third Circuit recognized that the presence of a non-school sponsored religious group within the school during the curriculum day had the effect of advancing religion in light of the perceptions of impressionable students. This was true even though the students had agreed, in an effort to mitigate the potential effect, not to use bulletin boards, newspapers or the public address system to promote their meetings. 741 F. 2d at 542. The court likewise found excessive religious-secular entanglement was present as a result of the school district's responsibility to maintain safety, order and a secular schedule, and the potential need to settle controversies and disputes between students on religions issues. 741 F. 2d at 556-557. In *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F. 2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983), the Fifth Circuit also recognized the potential harmful effect upon impressionable students caused by the district permitting religious meetings to occur immediately before and after school. 669 F. 2d at 1045. The court noted a critical factor in its decision was the existence of the compulsory education day, which made students available to attend voluntary religious meetings. 669 F. 2d at 1046. In *Collins v. Chandler United School District*, 644 F. 2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981), the Ninth Circuit recognized religious activities "in the institutionally coercive setting of primary and secondary schools" are sufficient to justify a conclusion that the district's action had the impermissible effect of advancing religion in violation of the First Amendment establishment clause, and further, that a hands-off attitude by the school district was unacceptable. 644 F. 2d at 762. In *Bell v. Little Axe Independent School District No. 70*, 766 F. 2d 1391 (10th Cir. 1985), the Tenth Circuit recognized that, as a result of both the impressionable nature of students and their inability to avoid contact with religious participants because of the compulsory education laws, the impermissible effect of advancing religion existed. The court also found excessive entanglement of state and religion was present. Finally, in *Nartowicz v. Clayton County School District*, 736 F. 2d 646 (11th Cir. 1984), the Eleventh Circuit recognized establishment clause violations were present when a school district permitted religious groups to disseminate "secular" messages at a school during the school day. The court cited the

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secondary school students and the captive audience effect created by compulsory attendance laws, such as California Education Code Section 48200, have recently been recognized by this Court in *Fraser, supra,* 478 U.S. at —, 92 L.Ed. 2d at 558. See also, *Hazelwood, supra,* 498 U.S. at —, 108 S.Ct. at 567; Cf. *Widmar v. Vincent,* 454 U.S. at 274, n.14.

In essence, this case does not involve students who simply wish to meet and discuss their own personal points of view. Rather, this case involves students who, with out-

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impressionable nature of students, who might not discern subtleties involved in "secular" announcements made by religious persons using school facilities. The holding noted the fact that the parties had agreed that announcement of religious activities would be impermissible. 736 F. 2d 649 and 649, n.3. See also, *Hernandez v. Hanson,* 430 F. Supp. 1154, 1162 (D. Neb. 1977); *Hunt v. Board of Education County of Kanawha,* 321 F. Supp. 1263 (S.D. W. Va. 1971); *Garnett v. Renton School District No. 403,* 675 F. Supp. 1268 (W. D. Wash. 1987); *Clark v. Dallas Independent School District,* 671 F. Supp. 1119 (N. D. Tex. 1987); *State ex rel. Greisinger v. Grand Rapids Board of Education,* 100 N. E. 2d 294 (Ohio), *cert. denied,* 340 U.S. 820 (1950), *reh. denied,* 341 U.S. 917 (1951); *State Board of Education v. Board of Education of Netcong,* 270 A. 2d 412 (N.J. 1970), *cert. denied,* 401 U.S. 1013 (1971); *Johnson v. Huntington Beach Union High School District, supra,* 68 Cal. App. 3d 1; but see *Bender v. Williamsport Area School District,* 563 F. Supp. 697 (M. D. Pa. 1983), *reversed* 741 F. 2d 538 (3rd Cir. 1984), *vacated on jurisdictional grounds,* 475 U.S. 534 (1986).

An additional establishment clause problem is created by the religious content of the advertisements. Two of the advertisements set forth the Biblical text found at II Corinthians 5:17, and the third contained the statement, "Christ is born. God kept his promise." Many courts have found the distribution of religious literature on a public school campus to be inappropriate. *Meltzer v. Board of Public Instruction of Orange County, Florida,* 548 F. 2d 559 (5th Cir. 1977); *Goodwin v. Cross County School District No. 7,* 394 F. Supp. 417 (E. D. Ark. 1973); *Brown v. Orange County Board of Public Instruction,* 128 So. 2d 181 (Fla. App. 1960); *Tudor v. Board of Education,* 14 N. J. 31, 100 A. 2d 857 (1953), *cert. denied, sub. nom., Gideons International v. Tudor,* 348 U.S. 816 (1954).

side assistance, have undertaken an organizational effort during the compulsory attendance day to build a student organization committed to religious study, and which would hold organized meetings during the compulsory attendance day. Such a purpose and direction is totally inconsistent with the defined purpose of the state-supported public school system for children.[22] Moreover, if the School District allowed this activity, the effect and entanglement problems recognized by the federal courts in the above-referenced establishment clause cases and by this Court in *Lemon*, clearly would become relevant.

IV. CONCLUSION

For all the foregoing reasons, Respondent submits that Petitioners have failed to establish any sound basis for this Court to review the holding below. The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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[22] As noted by one California court: "The purpose of . . . High School, as of any school, is to educate and not . . . to provide appellant with a 'captive audience for speech making,' to wit: an audience composed of students who are having lunch at or about the quad." *Lipkis v. Caveney*, 19 Cal. App. 3d 383, 387, 96 Cal. Rptr. 779 (1971).

APPENDIX A

RELEVANT STATUTORY PROVISIONS

State of California Education Code Section 44807 provides:

§ 44807. Duty concerning conduct of pupils

Every teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds or during recess. A teacher, vice principal, principal, or any other certificated employee of a school district, shall not be subject to criminal prosecution or criminal penalties for the exercise, during the performance of his duties, of the same degree of physical control over a pupil that a parent would be legally privileged to exercise but which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning. The provisions of this section are in addition to and do not supersede the provisions of Section 49000.

State of California Education Code Section 48200 provides:

§ 48200. Children between ages 6 and 18 years

Each person between the ages of 6 and 18 years not exempted under the provisions of this chapter or Chapter 3 (commencing with Section 48400) is subject to compulsory full-time education. Each person subject to compulsory full-time education and each person subject to compulsory continuation education

not exempted under the provisions of Chapter 3 (commencing with Section 48400) shall attend the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday by the governing board of the school district in which the residency of either the parent or legal guardian is located and each parent, guardian, or other person having control or charge of the pupil shall send the pupil to the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday by the governing board of the school district in which the residence of either the parent or legal guardian is located.

Unless otherwise provided for in this code, a pupil shall not be enrolled for less than the minimum schoolday established by law.

State of California Education Code Section 48907 provides:

§ 48907. Student exercise of free expression

Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commis-

sion of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.

Each governing board of a school district and each county board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction.

Student editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section.

There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section.

"Official school publications" refers to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.

Nothing in this section shall prohibit or prevent any governing board of a school district from adopting otherwise valid rules and regulations relating to oral communication by students upon the premises of each school.

State of California Education Code Section 48930 provides:

§ 48930. Purpose and privileges of student body organization

Any group of students may organize a student body association within the public schools with the approval and subject to the control and regulation of the governing board of the school district. Any such organization shall have as its purpose the conduct of activities on behalf of the students approved by the school authorities and not in conflict with the authority and responsibility of the public school officials. Any student body organization may be granted the use of school premises and properties without charge subject to such regulations as may be established by the governing board of the school district.

State of California Education Code Section 48932 provides:

§ 48932. Authorization for activities by student organizations; fund-raising

The governing board of any school district may authorize any organization composed entirely of pupils attending the schools of the district to maintain such activities, including fund-raising activities, as may be approved by the governing board.

The governing board of any school district may, by resolution, authorize any student body organization to conduct fund-raising activities on school property during school hours provided that the governing board has determined that such activities will not interfere with the normal conduct of the schools.

California Administrative Code, Title 5, Section 5552 provides:

5552. Playground Supervision.

Where playground supervision is not otherwise provided, the principal of each school shall provide for the supervision by certificated employees of the conduct and safety, and for the direction of play, of the pupils of the school who are on the school grounds during recess and other intermissions and before and after school.

APPENDIX B

RELEVANT SCHOOL BOARD POLICY AND ADMINISTRATIVE REGULATION

Saddleback Valley Unified School District Board Policy No. 5133.1 provides:

a. *Clubs: School Sponsored* *5133.1*

Clubs recognized by the Board of Education are those which are sponsored by the individual schools of the district. Clubs shall be responsible to the school through which they are organized.

The club's charter must be approved by the Associated Students' governing body and by the principal of the school. Membership must be limited to the students attending the school, and must be open to all students who meet the qualifications and standards of membership set forth in the club charter. A copy of the charter must be on file in the principal's office.

Any organization must be sponsored by a member of the faculty approved by the principal, deposit all monies collected and check out all monies through the school's financial secretary according to school regulations. All club accounts shall be audited, have the approval of the sponsor for the time and place and all activities carried on by the organization, including regular meetings. The sponsor must be present at all meetings and request and receive approval from the school principal for special social events.

School-sponsored clubs may be permitted to use official name of the school, to use building and other facilities, to have publicity in daily bulletins, bulletin boards and school publications, to wear identifying emblem but not special clothing, to sell on school premises tickets or bids to special activities sponsored by the club.

No off-campus or private clubs are permitted to function in the school. They are also restricted from advertising in any form.

The only clubs and organizations which may use school facilities during the school day are those which are school sponsored. The school day includes nonclassroom time.

It is the obligation of the school principal to see to it that the school-sponsored clubs and organizations are not in any way unlawfully selective or discriminatory.

Saddleback Valley Unified School District Administrative Regulation No. 5133.1 provides:

a. *Clubs; School Sponsored* *5133.1*

1. *Responsibilities of the Principal*

(a) Each principal shall be responsible for developing appropriate procedures for forming a school-sponsored club. The steps necessary to form a school-sponsored club are to be in writing, and are to be available in the following locations:

. . . The principal's office

. . . The activities office (if applicable)

. . . The student handbook

. . . The faculty handbook

(b) The principal is responsible for ensuring that each school-sponsored club has an appropriate faculty member as the club sponsor. Voluntary participation by faculty members as sponsors is encouraged. No club may function without a sponsor.

(c) The principal shall review and make the decision to approve or disapprove each club charter, after the Associated Student's governing body has done so. Each charter must contain:

. . . A statement of purpose

. . . A constitution and/or set of bylaws

. . . A method for election of officers

. . . Qualifications and standards for membership

All school-sponsored clubs must have a purpose and conduct activities in compliance with Board Policy 5133.1

(d) The principal shall ascertain that all clubs sponsored by the school are not unlawfully selective nor discriminatory in membership selection nor in the conduct of their activities. Any incidence of unlawful selection or discriminatory conduct is to be dealt with by causing the unlawful practice to cease or by disbanding the club.

(e) The principal shall be responsible for making sure no off-campus, private, or non-sponsored clubs or organizations function on the campus during the school day, including break times, lunch, or other non-classroom time. These clubs or other organizations may apply through the appropriate Use of Facility channels to use school facilities outside of the school day.

2. *Responsibilities of the Sponsor*

(a) Each club sponsor shall be responsible for:

. . . Attending all meetings of the club

. . . Approving all requests for expenditures

. . . Approving all club activities, including location and time

. . . Approving all advertising

(b) The sponsor shall inform the principal or his designee of any significant or potentially significant problems with the club or individual club members.

3. *Freedom of Expression*

Nothing in Board Policy 5133.1 nor Administrative Regulation 5133.1 shall be construed to be in opposition to students' rights of freedom of expression as specified in Education Code Section 48916* or Board Policy 5145.3 and 6144.1.

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* Former Education Code Section 48916 was repealed in 1983. See, now Section 48907. (Reply App. A at 2-3)